

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY HENCE,

Plaintiff,

Hon. Janet T. Neff

v.

Case No. 1:08-CV-1231

MARY BERGHUIS, et al.,

Defendants.

ORDER

This matter is before the Court on Plaintiff's Motion to File a Second Amended Complaint. (Dkt. #45). As discussed below, Plaintiff's motion is **granted**.

Plaintiff asserts that Defendants subjected him to harmful levels of second-hand smoke in violation of his Eighth Amendment rights. (Dkt. #1, 5). Plaintiff now seeks to amend his complaint to assert additional claims. Defendants have not opposed Plaintiff's motion.

Pursuant to Federal Rule of Civil Procedure 15(a), leave to amend a complaint shall be “freely given when justice so requires.” The factors relevant when considering a motion to amend include: (1) undue delay in filing, (2) lack of notice to the opposing party, (3) bad faith by the moving party, (4) repeated failure to cure deficiencies by previous amendments, (5) undue prejudice to the opposing party, and (6) futility of amendment. *See Wade v. Knoxville Utilities Board*, 259 F.3d 452, 458 (6th Cir. 2001). Notice and substantial prejudice to the opposing party are the “critical factors” in determining whether an amendment should be granted. *Id.* at 458-59.

The Court finds no evidence of undue delay or bad faith in this matter. Plaintiff is a layperson proceeding without benefit of counsel. He is not seeking to add claims based on newly

asserted facts. The factual basis for the claims asserted in Plaintiff's proposed amended complaint were articulated in his previous amended complaint. Thus, the Court finds that Defendants have been given sufficient notice of these claims and will not suffer prejudice as a result of granting Plaintiff's motion. In sum, consideration of the relevant factors weighs in favor of granting Plaintiff's motion to amend his complaint. The Court, therefore, **grants** Plaintiff's motion to amend his complaint.

The Court, however, does not want to litigate the claims asserted in Plaintiff's proposed second amended complaint in piecemeal fashion. Accordingly, Defendants' motion to dismiss, (dkt. #19), and motion for summary judgment, (dkt. #30), filed in response to Plaintiff's first amended complaint are hereby **denied without prejudice**.

IT IS ORDERED that Plaintiff's Motion to File a Second Amended Complaint, (dkt. #45), is **granted**; Defendants' Motion to Dismiss, (dkt. #19), is **denied without prejudice**; and Defendants' Motion for Summary Judgment, (dkt. #30), is **denied without prejudice**; and Plaintiff's Motion for Leave to File a Supplemental Complaint to Add an Additional Claim for Relief, (dkt. #22), is **denied as moot**.

IT IS FURTHER ORDERED that in accordance with Administrative Order No. 03-029, the Clerk shall return to Plaintiff with a copy of this order one copy of Plaintiff's proposed amended complaint and any exhibits attached thereto.

IT IS FURTHER ORDERED that immediately upon receipt of this order, Plaintiff shall request that the prison make two (2) copies of the complaint and exhibits for service upon each Defendant. Plaintiff is responsible for the cost of the copies. If Plaintiff does not have sufficient funds to pay for the copies, the Michigan Department of Corrections provides loans for legal copies. See MICH. DEP'T. OF CORR., Policy Directive 05.03.116.

IT IS FURTHER ORDERED that within fifteen business days of this order, Plaintiff shall file with the Court the requisite number of copies of the complaint and exhibits along with a copy of this order OR an affidavit explaining why Plaintiff is unable to provide the requested copies within the fifteen-day period. Should the Court find that the prison failed to make copies upon Plaintiff's request, the Court will direct the Clerk to make such copies as may be necessary and to charge the Michigan Department of Corrections for the cost of copying at the Court's usual rate of \$.50 per page.

IT IS FURTHER ORDERED that Plaintiff's failure to submit the requested copies within the time provided by the Court or affidavit explaining why Plaintiff is unable to provide the requested copies may result in the dismissal of his action without prejudice by the Court.

IT IS FURTHER ORDERED that upon receipt of the copies required by this order, the Clerk shall arrange for service of summons and complaint, along with a copy of this order, upon Defendants.

IT IS FURTHER ORDERED that Defendants shall reply to the complaint by way of answer, motion to dismiss, or motion for summary judgment within the time allowed by law. *See* 42 U.S.C. § 1997e(g)(1).

IT IS SO ORDERED.

Date: December 1, 2009

/s/ Janet T. Neff

HON. JANET T. NEFF
United States District Judge